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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

RAUL PINGOL MERCADO,

Petitioner,

v.

JOHN ASHCROFT, Attorney General of the United States, et al.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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November 29, 2004

QUESTIONS PRESENTED

1. Whether Immigration and Naturalization Act § 212(h), 8 U.S.C. § 1182(h), which denies discretionary relief from removal to Legal Permanent Residents (LPRs) convicted of an aggravated felony, but makes such relief available to illegal aliens (non-LPRs) who are convicted of an aggravated felony, violates the equal protection guarantees afforded all aliens under the Fifth Amendment.

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INA § 212(H), 8 U.S.C. § 1182(H), WHICH DENIES DISCRETIONARY RELIEF FROM REMOVAL TO LEGAL PERMANENT RESIDENTS (LPRS) CONVICTED OF AN AGGRAVATED FELONY, BUT MAKES SUCH RELIEF AVAILABLE TO ILLEGAL ALIENS (NON-LPRS) WHO ARE CONVICTED OF AN AGGRAVATED FELONY, VIOLATES THE EQUAL PROTECTION GUARANTEES AFFORDED ALL ALIENS UNDER THE FIFTH AMENDMENT 6-20

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No. ____

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RAUL PINGOL MERCADO,

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**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Petitioner, RAUL PINGOL MERCADO, respectfully prays that a writ of certiorari issue to review the decision of a panel of the Ninth Circuit Court of Appeals, affirming denial of his petition for writ of habeas corpus challenging the final order of removal issued by the Board of Immigration Appeals.

OPINION BELOW

The unpublished memorandum decision of the United States Circuit Court of Appeals for the Ninth Circuit affirming the denial of relief by the district court was filed on July 20, 2004, and corrected on July 22, 2004. On September 3, 2004 the circuit court denied Petitioner's Petition for Rehearing and Suggestion for Rehearing en banc. The corrected opinion of the Court of Appeals affirming the denial of relief, as well as the Order denying rehearing and rehearing *en banc*, are reproduced in the Appendix. (Please see Appendix, pp. 1-3.)

JURISDICTION

The district court had jurisdiction to review a final order of removal by the Board of Immigration Appeals pursuant to 28 U.S.C. § 2241 as interpreted by the Ninth Circuit in *Flores-Miramontes v. INS*, 212 F.3d 1133 (9th Cir. 2000). The circuit court has jurisdiction to review the final decision of the district court pursuant to 28 U.S.C. §§ 1291, 2252(a). In this case the judgment of the district court was entered on June 25, 2003 and after a timely appeal, the Circuit Court entered its judgment on July 20, 2004 and denied a timely Petitioner for Rehearing on September 3, 2004. This Court has jurisdiction to review the final decisions of the Circuit Courts of Appeals pursuant to 28 U.S.C. § 1254(1) if the Petitioner files a timely Petition for Writ of Certiorari. This petition is filed within the time allowed by Rules 13.1 and 13.3 of the Rules of this Court, following the circuit court order denying Petitioner's Petition for Rehearing, which was entered on September 3, 2004. (Please see Appendix, p. 3.)

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the interpretation of Immigration and Naturalization Act § 212(h), Title 8 U.S.C. § 1182(h). The text of the statute is set out in the Appendix at Appendix p. 4. In addition, the case involves the application of the equal protection provision of the Fifth Amendment.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The federal question presented on this Petition was raised in the direct appeal from the district court's denial of Petitioner's habeas corpus petition, filed in the district court to challenge the final order of removal from this country entered by the Board of Immigration Appeals based on a finding by the Board that Petitioner had been convicted of an aggravated felony (embezzlement), for which he was sentenced to serve a prison term of more than one year. (Please see INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G) and INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101 (a)(43)(M)(i).)

In his district court petition, Petitioner argued that INA § 2121(h), 28 U.S.C. § 1182(h) violates equal protection because the statute denies discretionary relief from removal to Legal Permanent Residents (LPRs) convicted of an aggravated felony, but makes such relief available to illegal aliens (non-LPRs) who are convicted of an aggravated felony.

The district court entered judgment approving a United States Magistrate Judge's Report and Recommendation to deny him relief and reject his equal protection argument on the basis of the opinion of the Ninth Circuit Court of Appeals in *Taniguchi v. Schultz*, 303 F.3d 950 (9th Cir. 2002) [rehearing and rehearing en ban denied, 332 F.3d 1205 (9th Cir. 2003).]

On appeal to the Ninth Circuit, Petitioner raised the same equal protection argument citing the opinion of Judge Pregerson dissenting from denial of rehearing en banc in *Taniguchi v. Schultz, supra*. Under controlling authority in the Ninth Circuit, the panel hearing Petitioner's appeal must not rule contrary to a prior Ninth Circuit published opinion but must treat the questions as settled by the prior published opinion. In affirming the district court's denial of relief, the panel opinion followed this rule, citing *Taniguchi v. Schultz, supra*, 303 F.3d 950. (Please see Opinion below, Appendix, pp. 1-2.)

SUMMARY OF ARGUMENT

The opinion below does not contain any reasoning, but simply cites and follows the published decision of the Ninth Circuit in *Taniguchi v. Schultz, supra*, 303 F.3d 950.

That decision, however, is flawed in its approach to the equal protection question, and there is a split of opinion on the validity of the holding in *Taniguchi*, as demonstrated by the opinion dissenting from denial of rehearing en banc in that case, as well as numerous published district court opinions which have reached the contrary conclusion - that it does indeed violate equal protection to deny discretionary relief from

removal to Legal Permanent Residents (LPRs) convicted of an aggravated felony, while making such relief available to illegal aliens (non-LPRs) who are convicted of an aggravated felony.

Petitioner urges this Court to grant certiorari and to conclude that Section 212(h) irrationally discriminates against LPRs who have achieved a status that this Court has recognized is similar to United States citizens in myriad ways (*In re Griffiths*, 413 U.S. 717, 722) and who this Court has historically treated more favorably than illegal aliens (non-LPRs). (See e.g., *Landon v. Plasencia*, 459 U.S. 21).

Petitioner further argues below that the panel decision in *Taniguchi* suffers from attributing to Congress a rationale that would not save the distinction between persons like Petitioner (LPRs) and illegal aliens (non-LPRs) from failing under a rational basis scrutiny. Thus, it is demonstrably incorrect that the intent of Congress was to treat LPRs less favorably because they would have a greater deterrent to committing aggravated felonies, since *under the limitations on the authorization to grant non-LPRs relief in the statute itself, only non-LPRs with the same motivations as LPRs are eligible for the relief.*

Further, the view that LPRs who commit aggravated felonies are less deserving than non-LPRs of a second chance is shown to be illogical because a non-LPR entertains a higher risk of deportation when he or she is apprehended for such an offense than an LPR based on status alone, and non-LPRs arguably have a greater incentive not to commit crimes than LPRs.

Finally, Petitioner argues that the most common asserted basis for the distinction – removal of LPRs is a rational "first step" toward the legitimate goal of removing all criminal aliens from the United States - violates the reasoning of *Heller v. Doe*, 509 U.S. 312, 320 (piecemeal reform efforts do not authorize Congress to draw arbitrary distinctions).

For all of these reasons, this Court is urged to conclude that the reasoning of *Taniguchi* is erroneous and that the arbitrary distinction drawn by Congress in Section 212(h) does indeed violate equal protection guarantees afforded all aliens under the Fifth Amendment.

ARGUMENT

Petitioner, a natural citizen of the Philippines, entered the United States on September 28, 1985. On January 24, 2000, the INS served Petitioner with Notice to Appear, charging that Petitioner should be removed from this country because he had been convicted of an "aggravated felony." 8 U.S.C. § 1227(a)(2)(A)(iii). At an April 27, 2000 administrative hearing Petitioner stated that he intended to seek an adjustment of his status pursuant to 8 U.S.C. § 1182(h) (INA § 212(h)).

After petitioner submitted forms I-485 (Application for Adjustment of Status) and I-601 (Application for Waiver of Ground of Excludability), Immigration Judge John T. Zastrow pretermitted Petitioner's applications and ordered him removed from the United States to the Philippines. (Decision and Order dated August 24, 2000).

Petitioner appealed this decision to the Board of Immigration Appeals ("BIA" or "Board"), but on February 26, 2001, the BIA entered a decision denying Petitioner's Appeal. On October 27, 2000, Petitioner filed a writ for petition for habeas corpus in the United States District Court for the Central District of California, Western Division.

Pursuant to an order of the assigned United States Magistrate Judge, Petitioner filed a First Amended Petition on December 29, 2000. On March 15, 2001, Respondent filed its Return to the First Amended Petition. On April 13, 2001 Petitioner filed his Traverse to the Return. In his pleadings, Petitioner alleged that: (1) His application for adjustment of status should have been granted and that he should be treated as a *lawful* Permanent Resident; (2) INA § 212(h) violates the equal protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution; (3) The mandatory detention provisions of INA § 236(c) are unconstitutional as applied to Petitioner.

On May 16, 2001, the United States Magistrate Judge filed its Report and Recommendation, recommending that the district court deny and dismiss the petition. After Petitioner filed objections to the Report and Recommendation on May 29, 2001, the United States Magistrate Judge filed an Amended Report and Recommendation.[1]

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[1] While the original Report and Recommendation reasoned that relief should be denied on the equal protection claim because legal permanent residents ("LPRs") convicted of an aggravated felony who are thus ineligible for a waiver of inadmissibility under § 212(h) are not "similarly situated" with non-legal permanent residents ("non-LPRs") convicted of an aggravated felony who are nevertheless eligible for waiver relief under § 212(h), the Amended Report and Recommendation abandoned this reasoning in favor of the intervening holding in *Taniguchi v. Schultz, supra*, 303 F.3d 950.

The district court dismissed the action with prejudice. The judgment appealed from was entered on June 25, 2003, seven days after this Court denied rehearing in *Taniguchi v. Schultz*, *supra*, 303 F.3d 950. On August 21, 2003 Appellant filed a timely Notice of Appeal from the judgment.

This case presents a question on which federal courts are divided. Although the preponderance of lower courts that have considered the question have found that the discrimination in 8 U.S.C. § 1182(h)[2] against Lawful Permanent Residents ("LPRs"), and in favor of illegal aliens and ("non-LPRs") violates equal protection under the Fifth Amendment, there is a significant contrary view. Moreover, none of the cases that have held in favor of the Government on this question appear to have considered or dealt with (i.e., discussed) the arguments made by the proponents of the conclusion that the disparate treatment of LPRs and non-LPRs in Section 1182(h) does violated equal protection. Finally, virtually *all* of the decisions finding no violation of equal protection are based on the same three arguments which have been repeated uncritically despite a persuasive rebuttal already published in the few contrary opinions.

It is undisputed that elsewhere in Section 1182 Congress has conferred on the Attorney General the power to grant a waiver of inadmissibility to aliens. However, this power is withdrawn when the alien is an LPR. The language of the statute in question is clear on its face:

> "No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing

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[2] Also frequently cited as INA §212(h).

> acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection." (8 U.S.C. § 1182(h)(2) [second paragraph]. (Appendix, pp. 8-9.) [Underlining supplied.]

Nor is it disputed that this same statute clearly confers the power to grant such a waiver to a non-LPR who has been convicted of an aggravated felony. On its face, this distinction appears to punish (i.e., treat less favorably)[3] a person who has demonstrated his or her ability and determination to accomplish a large number of goals which the Immigration laws, and the decisions of this Court, consider laudable compared to the accomplishments of an illegal alien who has not complied with U.S. law governing admission to our borders, and the right to live and work here. For example, in *In re Griffiths*, *supra,* 413 U.S. 717, 722 this Court stated:

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[3] Petitioner does not suggest this is "punishment" in the sense that would be significant for the cruel and unusual punishment or *ex post facto* provisions.

> "Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities."

Similarly, in *Landon v. Plasencia*, *supra*, 459 U.S. 21, 33-34, this Court emphasized the more favorable constitutional position that has been earned by an LPR. After noting that an illegal alien has fewer procedural due process rights, the Court in *Landon* stated:

> "As we explained in Johnson v. Eisentrager, 339 U.S. 763, 770, 70 S.Ct. 936, 939, 94 L.Ed. 1255 (1950), however, once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly. Our cases have frequently suggested that a continuously present resident alien is entitled to a fair hearing when threatened with deportation, see, e.g., United States ex rel. Tisi v. Tod, 264 U.S. 131, 133, 134, 44 S.Ct. 260, 261, 68 L.Ed. 590 (1924); Low Wah Suey v. Backus, 225 U.S. 460, 468, 32 S.Ct. 734, 735, 56 L.Ed. 1165 (1912) (hearing may be conclusive "when fairly conducted"); see also Kwong Hai Chew, 344 U.S., at 598 n. 8, 73 S.Ct., at 478 n. 8, and, although we have only rarely held that the procedures provided by the executive were inadequate, we developed the rule that a continuously present permanent resident alien has a right to due process in such a situation.

> See, e.g., United States ex rel. Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 106, 47 S.Ct. 302, 303, 71 L.Ed. 560 (1927); The Japanese Immigrant Case, 189 U.S. 86, 100-101, 23 S.Ct. 611, 614, 47 L.Ed. 721 (1903); see also Wong Yang Sung v. McGrath, 339 U.S. 33, 49-50, 70 S.Ct. 445, 453-54, 94 L.Ed. 616 (1950); Bridges v. Wixon, 326 U.S. 135, 153-154, 65 S.Ct. 1443, 1452, 89 L.Ed. 2103 (1945)."

Exemplary of the view that Petitioner asks this Court to reject is the panel opinion in *Taniguchi v. Schultz*, *supra*, 303 F.3d 950.[4]

In the 3-judge panel decision in *Taniguchi*, the Court rejected the Appellant's contention that INA § 212(h), 8 U.S.C. § 1182(h) ("Section 212(h)") violates equal protection because it rendered LPRs ineligible to apply for a waiver of exclusion or deportation after conviction of a serious crime, but leaves non-LPRs eligible to apply.

The court held the two groups were similarly situated but that the equal protection question is subject to the lowest scrutiny - the rational basis - test, and that there were some identifiable rational bases for Congress to distinguish between LPRs and non-LPRs in crafting the distinction.

Specifically, the opinion sets forth three rationales: (1) Congress could have believed that LPRs who committed an aggravated felony were more likely to be recidivists than non-

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[4] Counsel for Petitioner is informed that the Appellant in *Taniguchi* did not petition for certiorari in this Court, and can find no record in the public docket of this Court to the contrary.

LPRs who committed the same crime because it believed that LPRs who commit an aggravated felony are more likely to be recidivist because their substantial employment and family ties in the United States were insufficient to deter them from the criminal conduct that rendered them deportable; (2) "aggravated felon LPRs could be viewed as less deserving of a second chance than non-LPRs," because they have jeopardized their status by committing a crime (303 F.3d at 958); and (3) the law is a rational "first step" towards the legitimate goal of removing criminal aliens from the United States.

In his dissent from denial or rehearing en banc, Judge Pregerson carefully considered and exposed each of these arguments as not being rational steps toward the goals identified, or not being justified at all. Judge Pregerson wrote:

> As to the view that Congress may have believed LPRs are more likely to be recidivists than non-LPRs:
>
> "By upholding § 212(h) on the basis that Congress could have believed that LPRs were more likely to be recidivists than non-LPRs because LPRs have more substantial family ties to the United States, the panel contravenes our rule that courts examining equal protection challenges must be "careful not to attribute to the government purposes which it cannot reasonably be understood to have entertained." *Wauchope v. United States Dept. of State,* 985 F.2d 1407, 1415 (9th Cir.1993) (internal citations and brackets omitted). The plain

> language of § 212(h) illustrates that it is inconceivable that Congress barred LPRs from § 212(h) discretionary relief because Congress believed that LPRs were less deserving of relief because of their family ties to the United States; family ties are a statutory prerequisite for non-LPRs to obtain relief under § 212(h). Thus, Congress could not have believed that family connections rendered LPRs less worthy of relief because Congress explicitly conditioned eligibility under § 212(h) to non-LPRs who have substantial family ties to a United States citizen or LPR parent, spouse, or child." *Taniguchi v. Schultz*, 332 F.3d 1205, 1207, n. 2

This analysis which Petitioner believes to be unassailable has never been addressed in any published opinion located by counsel for Appellant in this or any other circuit.

Judge Pregerson further explained:

> As to the view that aggravated felon LPRs could be viewed as less deserving of a second chance than non-LPRs, because they have jeopardized their status by committing a crime:

> "Furthermore, the notion that 'aggravated felon LPRs could be viewed as less deserving of a second chance than non-LPRs', because they have jeopardized their status by committing a crime, is illogical. If anything, non-LPRs have

more to risk by committing a crime. When a non-LPR commits a crime, he or she risks his or her presence in the United States because both the state and federal government routinely check the immigration status of individuals following an arrest. *See, e.g.,* Cal. Health & Safety Code § 11369 (requiring agency arresting individual for drug crimes to notify the 'appropriate agency of the United States having charge of deportation matters' if there is reason to believe the individual may not be a citizen of the United States); 8 U.S.C. § 1357(d) (describing process for federal, state or local law enforcement officials to report an individual arrested for controlled substance crimes when the officer has reason to believe that he or she is not lawfully present in the United States); *Am. G.I. Forum v. Miller,* 218 Cal.App.3d 859, 267 Cal.Rptr. 371 (Cal.App.1990) (upholding against various constitutional challenges California's Automated Regional Justice Information System arrest form which requires arresting officer to ask and record whether the arrestee is an undocumented person in part because officers may have to 'notify federal authorities when an arrestee is an illegal alien'). A non-LPR risks removal based on his or her undocumented status *alone* when he or she commits a crime because federal or state officials routinely check arrestees' immigration status. By contrast, when an LPR commits a crime, his or her status as an LPR will not subject him or her to immigration proceedings.

Thus, non-LPRs arguably have a more compelling incentive to obey the law than LPRs." *Id.*, at pp. 1207-1208, n. 3 omitted.

Finally, as to the third rationale, Judge Pregerson wrote:

> As to the view that [Section 212(h)] is a rational "first step" towards the legitimate goal of removing criminal aliens from the United States:

"The majority's characterization of § 212(h) relief as a rational 'first step' towards the legitimate goal of removing criminal aliens from the United States is also untenable. A piecemeal reform effort does not authorize Congress to draw arbitrary distinctions. Even when Congress takes an incremental step toward a broader reform that creates discrimination against a certain group, the resulting 'disparity of treatment' must be rationally related to some legitimate government purpose; Congress' decision to start with LPRs must be rational. *See Heller v. Doe,* 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). If Congress' intent was to remove criminal aliens, § 212(h) is not a rational step toward this goal because it makes relief available to people who have committed two crimes while barring relief to those who have committed only one. There is no rational basis for Congress to effectuate its 'first step' in streamlining the removal process for *dangerous*

> aliens by treating LPRs and non-LPRs differently; a more rational distinction would be based on the nature of the crime rather than on an alien's immigration status." *Id.*, at p. 1208.

Rarely has a jurist so forcefully and dramatically demonstrated that what appears to be a rational basis for a congressional distinction is in fact neither rational nor subject to the reasoning ascribed to Congress. It appears to be indisputable that none of the three rational bases relied upon by the panel in *Taniguchi* can survive Judge Pregerson's analysis, and that his conclusion that Section 212(h) does violate equal protection is the better view.

Petitioner has canvassed the Section 212(h) equal protection decisions of the various federal circuits and learned that while several circuits have reached the same result as the panel decision in *Taniguchi*, not all have done so on the same rationale, and none have considered or addressed the cogent rejection of each of the three above rationales set forth by Judge Pregerson.

In *DeLeon-Reynoso v. Ashcroft*, 293 F.3d 633 (3rd Cir. 2002), the Third Circuit rejected the Appellant's equal protection argument on the "family ties" rationale rebutted by Judge Pregerson in his dissent from denial of rehearing in *Taniguchi*. In *Latu v. Ashcroft*, – F.3d – , 2004 WL 1551593 (10th Cir. 2004), in a 3-judge panel opinion, the Tenth Circuit relied upon the identical three rationales for upholding Section 212(h) that were relied upon in *Taniguchi*, but without addressing any of Judge Pregerson's arguments. Moreover, the court there noted that in reaching a similar conclusion in *Lara-Ruiz v. INS,* 241 F.3d 934, 947 (7th Cir.2001) the Seventh

Circuit opined that the approach in Section 212(h) "might have been wiser, fairer, and more efficacious" than it was.

The Second Circuit also relied on these same reasons in *Jankowski-Burczyk v. INS*, 291 F.3d 172 (2d Cir. 2002). There the court argued that LPRs owed a greater duty to obey the law than non-LPRs and posed a greater risk of recidivism. Both reasons were soundly refuted by Judge Pregerson's arguments discussed above, which were not addressed in the Second Circuit's 3-judge panel opinion.

In *Moore v. Ashcroft*, 251 F.3d 919 (11th Cir. 2001) the Eleventh Circuit used the "first step toward removing alien felons" theory, also rebutted by Judge Pregerson's dissent, without addressing the analysis Judge Pregerson set forth. *Moore* was followed by the Eleventh Circuit in the same rationale in *Obuejiofor v. Attorney General*, 277 F.3d 1305 (11th Cir. 2002), again without mentioning Judge Pregerson's dissent or addressing the ideas therein. The Eighth Circuit used the identical "first step" rationale in *Lukowski v. INS*, 279 F.3d 644 (8th Cir. 2002) without considering Judge Pregerson's arguments.[5] The question appears to be open in the First, Fourth, Fifth, Sixth and D.C. Circuits and it has not been addressed by this Court.

Moreover, Judges Pregerson and Reinhardt (who joined in the dissent from denial of rehearing en banc in *Taniguchi*) do

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[5] In *Ramtulla v. Ashcroft*, 301 F.3d 202 (4th Cir. 2002) the Fourth Circuit sidestepped the issue altogether. Similarly, in *Roman v. Ashcroft*, 340 F.3d 314 (6th Cir. 2004) the Sixth Circuit reversed a district court ruling that Section 212(h) violated equal protection but did so on grounds unrelated to equal protection. In *Garcia-Echaverria v. United States*, — F.3d. —, 2004 WL 1533930 (6th Cir. 2004) the Sixth Circuit ruled the appellant there had no standing to assert the equal protection argument because he would have been ineligible based on his narcotics conviction even if he had been a non-LPR.

not stand alone in reaching the conclusion that Section 212(h) does violate equal protection. They are joined by several United States District Judges who, in published opinions, have reached the same conclusion. While none of them have become the law of their circuit, many United States District Judges have filed published opinions holding Section 212(h) violates equal protection, just as Judge Pregerson and Judge Reinhardt have concluded.[6]

This Court is urged to grant certiorari to consider whether, as Judge Pregerson wrote:

> ". . . INA § 212(h), 8 U.S.C. § 1182(h), which denies discretionary relief from removal to Legal Permanent Residents (LPRs) convicted of an aggravated felony, but makes such relief available to illegal aliens (non-LPRs) who are convicted of an aggravated felony, violates the equal protection guarantees afforded all aliens under the Fifth Amendment." *Id.*, at p. 1208.

Title 8 U.S.C. § 1182(h), which denies discretionary relief from removal to Legal Permanent Residents (LPRs)

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[6] See e.g., *Roman v. Ashcroft,* 181 F.Supp.2d 808, 812-14 (N.D.Ohio 2002) [holding Section 212(h) violates equal protection]vacated 340 F.3d 314; In *Song v. INS*, 82 F.Supp.2d 1121 (CD Ca, 2000), Judge Feess held Section 212(h) does violate equal protection because the distinction giving non-LPR's the possibility of a waiver while denying that possibility to LPRs was not rational, as it created incentive to become an illegal immigrant and punished those immigrants with closer ties to the United States. Of course the decision cannot survive *Taniguchi* but the reasoning of the opinion supports Appellant's view that the issue deserves en banc consideration by this Court and consideration by the United States; See also *Gutierrez-Perez v. Fasano*, 37 F.Supp.2d 1166 (SD Ca 1999) [same]; *Jankowski v. INS*, 138 F.Supp.2d 269 (D. Conn. 2001) [U.S. Dist. Judge Hall ruled Section 212(h) violated equal protection]; In *Roman v. Ashcroft, supra*, 181 F.Supp.2d 808, Dist. Judge Anne Aldridge similarly held Section 212(h) violative of equal protection];

convicted of an aggravated felony, but makes such relief available to illegal aliens (non-LPRs) who are convicted of an aggravated felony, violates the equal protection guarantees afforded all aliens under the Fifth Amendment. Not only does § 212(h) irrationally discriminate against LPRs, but the rationale attributed to Congress by the courts that have upheld it against an equal protection challenge is illogical and inconsistent with the statute's purpose.

There is no rational justification for providing the benefit of discretionary relief from removal to non-LPRs who have committed aggravated felonies, while denying the same relief to LPRs who have also committed aggravated felonies. I also believe that § 212(h) is fundamentally unfair because unlike its beneficial treatment of non-LPRs, § 212(h) punishes LPRs who are immigrants that have taken a positive step to become lawful members of American society. Section 212(h) in effect rewards aliens who have committed two crimes--an unlawful entry and an aggravated felony--while punishing aliens who have committed only one crime--an aggravated felony. (Cf., *Id.*, at p. 1208.)

Finally, Congress itself has usually favored LPRs over non-LPRs. *See, e.g.,* 8 U.S.C. § 1153 (considering LPRs the most favored category in allocation of immigrant visas); 8 U.S.C. § 1229(b) (requiring seven year continuous physical presence requirement for LPRs but ten year requirement for non-LPRs); 8 U.S.C. §§ 1601-1666 (eliminating all welfare benefits for non LPRs but preserving some benefits for LPRs).

Conclusion

For all these reasons, this Court is urged to grant the writ and reverse the judgment of the Court of Appeals.

WHEREFORE, Petitioner prays that this Honorable Court grant his Petition and issue its Writ of Certiorari.

Respectfully submitted this 29th day of November, 2004.

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RAUL PINGOL MERCADO

APPENDIX

+Corrected July 22, 2004
NOT FOR PUBLICATION

United States Court of Appeals,
Ninth Circuit.

RAUL PINGOL MERCADO, Alien Registration Number A 92 954 911, Plaintiff-Appellant
v.
JOHN ASHCROFT, Attorney General, Respondent-Appellee.

No. 003-56546
D.C. No. CV-00-11430-MMM

MEMORANDUM*[1]

Appeal form the United States District Court
for the Central District of California
Margaret M. Morrow, District Judge, Presiding

Submitted July 16, 2004**[2]
Pasadena, California
Filed July 20, 2004.

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

[2] This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Before: FARRIS, KOZINSKI, and SILVERMAN, Circuit Judges.

Mercado first argues that he was never legally admitted as a permanent resident in the United States, and he is consequently eligible for relief pursuant to 8 U.S.C. § 1182(h). It is undisputed that Mercado became a lawful permanent resident in 1990, when his status was adjusted under 8 U.S.C. § 1160. These facts establish that he was "admitted" for purposes of § 1182(h). *See* 8 U.S.C. § 1160(a)(2). ("The Attorney General shall adjust the status of any alien provided lawful temporary resident status . . . to that of an alien lawfully *admitted* for permanent residence.. . .") (emphasis added.); *see also In re Rosas-Ramirez*, 22 I&N Dec. 616, 1999 WL 187054 (BIA 1999) (holding that "aliens 'lawfully admitted for permanent residence' through the adjustment process are considered to have accomplished an 'admission,'" and specifically mentioning the statute under which Mercado became a legal resident, 8 U.S.C. § 1160.)

Mercado also argues that § 1182(h)'s differentiation between legal and illegal aliens violates equal protection. This argument was squarely rejected in *Taniguchi v. Schultz*, 303 F.3d 950, 957-58 (9th Cir. 2002).

+AFFIRMED

United States Court of Appeals,
Ninth Circuit.

RAUL PINGOL MERCADO, Alien Registration Number A 92 954 911, Plaintiff-Appellant

v.

JOHN ASHCROFT, Attorney General, Respondent-Appellee.

No. 003-56546
D.C. No. CV-00-11430-MMM
Central District of California
Los Angeles

ORDER

Filed September 03, 2004

Before: FARRIS, KOZINSKI, and SILVERMAN, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing. Judges Kozinski and Silverman have voted to deny the suggestion for rehearing en banc, and Judge Farris so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and suggestion for rehearing en banc are denied.

8 USCA S 1182

Effective: December 19, 2003
UNITED STATES CODE ANNOTATED
TITLE 8. ALIENS AND NATIONALITY
CHAPTER 12--IMMIGRATION AND NATIONALITY

SUBCHAPTER II--IMMIGRATION
PART II--ADMISSION QUALIFICATIONS FOR ALIENS; TRAVEL CONTROL OF CITIZENS AND ALIENS

§ 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

* * *

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of--

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in

section 802 of Title 21),

is inadmissible.

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if--

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

* * *

(D) Prostitution and commercialized vice

Any alien who--

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution,

is inadmissible.

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution

Any alien--

(i) who has committed in the United States at any time a serious criminal offense (as defined in section 1101(h) of this title),

(ii) for whom immunity from criminal jurisdiction was

exercised with respect to that offense,

(iii) who as a consequence of the offense and exercise of immunity has departed from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense,

is inadmissible.

(F) Waiver authorized

For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h) of this section.

* * *

(h) Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E)

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) of this section and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if--

(1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that--

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment

of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; or

(C) the alien qualifies for classification under clause (iii) or (iv) of section 1154(a)(1)(A) of this title or classification under clause (ii) or (iii) of section 1154(a)(1)(B) of this title; and

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who

has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

Supreme Court, U.S.
FILED

04-790 NOV 29 2004

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

RAUL PINGOL MERCADO,

Petitioner,

v.

JOHN ASHCROFT, Attorney General of the United States, et al.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S SUPPLEMENTAL APPENDIX

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United States District Court
Central District of California

RAUL PINGOL MERCADO, Petitioner,
v.
JANET RENO, et al., Respondents.

No. CV-00-11430-MMM (MAN)

JUDGMENT

Filed June 25, 2003
Entered June 25, 2003

Pursuant to the Order Accepting and Adopting Findings, Conclusions, and Recommendations of United States Magistrate Judge,

IT IS HEREBY ADJUDGED that this action is dismissed with prejudice.

Dated: June 24, 2003.

(Signed) Margaret M. Morrow
MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

United States District Court
Central District of California

RAUL PINGOL MERCADO, Petitioner,
v.
JANET RENO, et al., Respondents.

No. CV-00-11430-MMM (MAN)

ORDER ACCEPTING AND ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Filed June 25, 2003
Entered June 25, 2003

Pursuant to 28 U.S.C. § 636(b)(1)(B), the Court has reviewed the First Amended Petition, all of the records and files herein, the Amended Report and Recommendation of United States Magistrate Judge, and Petitioner's Objections. The Court has conducted a *de novo* review of those matters to which Objections have been made. The Court accepts and adopts the Magistrate Judge's Amended Report and Recommendation and denies Petitioner's request for a stay of this action, and notes that the United States Court of Appeals for the Ninth Circuit has denied rehearing and review *en banc* of Taniguchi v. Schultz, 303 F.3d 950 (9th Cir. 2002), which is cited in the Amended Report and Recommendation. *See* Taniguchi v. Schultz, ___ F.3d ___, 2003 WL 21397730 (9th Cir. June 18, 2003).

IT IS ORDERED that: (1) the First Amended Petition is DENIED; and (2) Judgment shall be entered dismissing this action with prejudice.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order and the Judgment herein on counsel for petitioner and counsel for respondents.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: June 24, 2003

(Signed) Margaret M. Morrow
MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

United States District Court
Central District of California

RAUL PINGOL MERCADO, Petitioner,
v.
JANET RENO, et al., Respondents.
No. CV-00-11430-MMM (MAN)

AMENDED REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Filed September 27, 2002

This amended Report and Recommendation is submitted to the Honorable Margaret M. Morrow, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order No. 01-13 of the United States District Court for the Central District of California.

INTRODUCTION

Petitioner, a national of the Philippines, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 on October 27, 2000. On January 16, 2001, petitioner filed a First Amended Petition. On March 15, 2001, respondents filed a Return to First Amended Petition. On April 13, 2001, petitioner filed a Traverse.

On May 16, 2001, United States Magistrate Judge Ann I. Jones issued a Report and Recommendation recommending that the petition be dismissed with prejudice.[1]

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[1] On September 20, 2002, this action was transferred
(continued...)

On May 29, 2001, petitioner filed his objections to the Report and Recommendation.

Since that time, the United States Court of Appeals for the Ninth Circuit has issued an opinion in Taniguchi v. Schultz, __ F.3d ___, 2002 WL 31115538 (9th Cir. September 25, 2002, as amended), which is directly controlling as to Petitioner's first claim. Accordingly, the Court issues this Amended Report and Recommendation, analyzing petitioner's first claim in light of Taniguchi. The recommendation that this action be dismissed remains unchanged.

BACKGROUND

Petitioner is a citizen of the Philippines. (Return, Exhibits at 18.) Petitioner entered this country on September 28, 1995, and became a lawful permanent resident on December 1, 1990. (*Id.* at 18, 46.) On December 2, 1996, while employed as a bank manager, petitioner embezzled over $90,000 from the account of a customer. Petitioner later attempted to hide the embezzlement by moving funds from another account and shredding documents. (*Id.* at 21-45.) On November 19, 1999, in a proceeding in this court, United States of America v. Raul Mercado, CR 99-0246-RSWL, petitioner pleaded guilty to the offense of embezzlement in violation of 18 U.S.C. §§ 2 and 656. (*Id.*) He received a sentence of one year and one day. (*Id.*)

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[1](...continued)
for pre-pretrial (sic) purposes to United States Magistrate Judge Margaret A. Nagle.

On January 24, 2000, the Immigration and Naturalization Service ("INS") issued petitioner a Notice to Appeal, charging that petitioner should be removed from this country because he had been convicted of an "aggravated felony" pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii). (*Id.* at 47.) Petitioner disputed removability and sought adjustment of status. On July 6, 2000, the immigration judge ("IJ") sustained the charge of removability. (*Id.* at 50.) The INS moved to pretermit petitioner's application for relief, and the parties briefed the issue of whether, despite his conviction, petitioner was statutorily eligible for a waiver pursuant to section 212(h) of the Immigration and Nationality Act ("INA"). (*Id.*) On August 24, 2000, the IJ pretermitted petitioner's application for relief and ordered him removed from the United States to the Philippines.

By notice of appeal dated September 21, 2000, petitioner sought review of the IJ's decision before the Board of Immigration Appeals ("BIA"). (*Id.* at 52.) On February 26, 2001, the BIA dismissed petitioner's appeal. (Traverse, Ex. A.)

On November 22, 2000, petitioner finished serving his sentence, and was released from the custody of the Bureau of Prisons to the custody of the INS. (Return at 4.)

PETITIONER'S CONTENTIONS

Petitioner raises the following claims:

1. INA § 212(h) violates the equal protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution.

2. The mandatory detention provisions of INA § 236(c) are unconstitutional as applied to petitioner.

DISCUSSION

A. INA § 212(h) Does Not Violate Petitioner's Equal Protection Rights.

Petitioner contends that his equal protection rights under the Fifth Amendment have been violated because, as a legal permanent resident ("LPR") convicted of an aggravated felony, he is ineligible to apply for a waiver of inadmissibility under INA § 212(h), whereas aliens who are not legal permanent residents ("non-LPRs") are eligible for section 212(h) relief even if they are convicted of aggravated felonies. (First Amended Petition at 9-16.)

Under 212(h), 8 U.S.C. § 1182(h), the Attorney General has the discretion to waive criminal grounds of inadmissibility in certain cases. The Attorney General may issue waivers to persons subject to removal due to their commission of certain crimes in the following instances:

> (1) . . . (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son or daughter of such alien; and

> (2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulation prescribe, has consented to the alien's applying for or reapplying for a visa, for admission to the United States, or adjustment of status.

8 U.S.C. § 1182(h)

However, under the amendments made by section 348(a) of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), section 212(h) further provides that "an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence" is ineligible for section 212(h) relief if "since the date of such admission the alien has been convicted of an aggravated felony." 8 U.S.C. § 1182(h). The BIA has interpreted this limitation to apply only to LPRs. *See* In re Michael, BIA Int. Dec. 3355, 1998 WL 40407 (BIA 1998) (section 212(h) relief available for non-LPR). Thus, while an LPR convicted of an aggravated felony cannot receive 212(h) relief, a non-LPR convicted of the same offense can.

The Fifth Amendment's constitutional guarantee of equal protection under the law applies to aliens as well as citizens. Yick Wo v. Hopkins, 118 U.S. 356, 373-74, 6 S.Ct. 1064, 1072-73 (1886). The Fifth Amendment requires the Government to treat similarly situated individuals similarly. Abboud v. INS, 140 F.3d 843, 847 (9th Cir. 1998). However, Congress's power over the exclusion and expulsion of aliens is very broad. Fiallo v. Bell, 430 U.S. 787, 792, 97 S.Ct. 1473, 1478 (1977); *see* Kleindienst v. Mandel, 408 U.S. 753, 766, 92 S.Ct. 2576, 2583 (1972) ("Over no conceivable subject is the legislative power of Congress more complete

than it is over the admission of aliens."). Congress may determine that certain classes of aliens are more likely than others to satisfy national objectives without undue costs, and it may grant preferential status to those aliens. Fiallo, 430 U.S. at 796 n. 6, 97 S.Ct. at 1479 n. 6. A statute that limits relief available to a certain class of aliens is "valid unless wholly irrational." Taniguchi, 2002 WL 31115538 at *6 (quoting Perez-Oropeza v. INS, 56 F.3d 43, 45 (9th Cir. 1995) (internal quotations marks omitted)). Such a statute must be upheld against an equal protection challenge "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Heller v. Doe, 509 U.S. 312, 319, 113 S.Ct. 2637, 2642 (1993).

In Taniguchi, the Ninth Circuit held that a rational basis exists for denying section 212(h) relief to aggravated felon LPRs but not to aggravated felons non-LPRs. 2002 WL 31115538 at *6-*7. The Ninth Circuit expressed its agreement on this issue with the Seventh and Eleventh Circuits in Moore v. Ashcroft, 251 F.3d 919 (11th Cir. 2001), and Lara-Ruiz v. INS, 241 F.3d 934 (7th Cir. 2001), which had rejected equal protection challenges to section 212(h). [2] The Ninth Circuit reasoned that, because LPRs enjoy substantial rights and privileges not shared by other aliens, it is proper to hold them to a higher standard and level of responsibility than non-LPRs. Taniguchi, 2002 WL

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[2] Other Courts of Appeal that have addressed this issue have also held that the distinction between LPRs and other aliens with respect to section 212(h) relief does not violate the Fifth Amendment's equal protection guarantee. *See* Jankowski-Burczyk v. INS, 291 F.3d 172 (2d Cir. 2002); Lukowski v. INS, 279 F.3d 644 (9th Cir. 2002); *see also* De Leon-Reynoso v. Ashcroft, 293 F.3d 633 (3rd Cir. 2002).

31115538 at *6. Furthermore, as LPRs generally have stronger ties to this country through family and employment relationships, LPRs convicted of aggravated felonies have demonstrated that these ties are insufficient to deter them from crime. *Id.* Thus, Congress could have reasoned that aggravated felon LPRs pose a higher risk of recidivism than non-LPRs, who did not have the benefits of legal permanent resident status to deter them from criminal conduct. *Id.* "Accordingly, aggravated felon LPRs could be viewed as less deserving of a second chance than non-LPRs." *Id.* (internal quotation marks omitted). *Accord* Moore, 252 F.3d at 925; Lara-Ruiz, 241 F.3d at 947-48.

The Ninth Circuit also noted that one of the purposes of Congress in enacting IIRIRA was to expedite the removal of criminal aliens from the United States. Taniguchi, 2002 WL 31115538 at *6; see S. Rep. No. 104-249 at 2 (1996). If an LPR removable as an aggravated felon were eligible for a waiver of inadmissibility, he might apply to adjust his status and, through a legal fiction, obtain "readmission" to the United States as an LPR. This would subvert Congress's intent to make him immediately removable. Taniguchi, 2002 WL 31115538 at *6; Lara-Ruiz, 241 F.3d at 947. The elimination of section 212(h) relief effectively bars aggravated felons from applying to adjust their status while still in the United States. Taniguchi, 2002 WL 31115538 at *6. It has, therefore, eliminated one source of delay in their removal. Lara-Ruiz, 241 F.3d at 947.

The Ninth Circuit further observed that, although it might seem "wiser, fairer, and more efficacious" for Congress to have eliminated section 212(h) relief for non-LPR as well as LPR aggravated felons, the statute was rational a step toward the expeditious removal of aliens who

have committed serious crimes. Taniguchi, 2002 WL 31115538 at *6; Moore, 251 F.3d at 923; Lara-Ruiz, 241 F.3d at 948. Congress may constitutionally adopt legislative reforms "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." Williamson v. Lee Optical of Okla., Inc., 348 U.S 483, 489, 75 S.Ct. 461, 465 (1955). Equal protection does not require "that all evils of the same genus be eradicated or none at all." Railway Express Agency, Inc. v. New York , 336 U.S. 106, 110, 69 S. Ct. 463, 465 (1949).

The Ninth Circuit's holding in Taniguchi binds the Court in this case. Under controlling Ninth Circuit authority, the difference in treatment between LPR and non-LPR aggravated felons with respect to their eligibility for section 212(h) relief does not violate the Fifth Amendment's equal protection guarantee. Accordingly, petitioner's first claim must be dismissed.

B. Petitioner No Longer Falls Within the Provisions of Section 236(c) And Cannot Challenge Its Constitutionality.

In his second claim, petitioner contends that the mandatory detention provisions of INA § 236(c) are unconstitutional as applied to him.[3] (First Amended Petition at 16-19).

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[3] The Ninth Circuit has held that the mandatory detention provisions of section 236(c) are unconstitutional as applied to LPRs. Kim v. Ziglar, 276 F.3d 523 (9th Cir.), *cert. granted*, 122 S. Ct. 2696 (2002).

Petitioner cannot assert a constitutional challenge to section 236(c) because its mandatory detention provisions no longer apply to him. Section 236 of the INA covers detention "pending a decision on whether the alien is to be removed from the United States." INA § 236(a), 8 U.S.C. § 1226(a). Section 241(a) of the INA covers detention of aliens who are subject to final orders of removal. INA § 241(a), 8 U.S.C. § 1231(a).

Petitioner was subject to the provisions of section 236(c) pending the final administrative decision regarding his removability. However, once petitioner's removal order was issued and became final, petitioner was no longer subject to the provisions of section 236(c). Petitioner's removal order became administratively final on February 26, 2001, when the BIA issued a decision dismissing his appeal. (Traverse, Ex. A). See 8 C.F.R. § 241.1. Petitioner, therefore, is currently being detained pursuant to the provisions of section 241(a).

Because petitioner no longer falls within the provisions of section 236(c), he cannot challenge the constitutionality of its mandatory detention provisions. Petitioner's second claim for relief, therefore, must be dismissed.

RECOMMENDATION

For all the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Amended Report and Recommendation; and (2) directing that Judgment be entered denying and dismissing the petition with prejudice.

DATED: September 27, 2002.

(Signed) Margaret A. Nagle
MARGARET A. NAGLE
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of judgment of the District Court.